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Supreme Court, U.S.
FILED
NOV 12 1997
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No. 97-552

In The

Supreme Court of the United States

October Term, 1997

DOMINO'S PIZZA, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

and

DAVID PAPA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR RESPONDENT DAVID PAPA IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this case is an appropriate vehicle for clarification of the standard for imposing liability on employers for hostile working environment sexual harassment, where:

a. this employer is also liable for *quid pro quo* sexual harassment and retaliatory discharge, and any clarification of standards of liability for hostile environment sexual harassment would not change the result here; and

b. there is general agreement among the circuit courts of appeals as to the standards for employer liability for *quid pro quo* sexual harassment and retaliatory discharge.

2. Whether the nature and scope of the injunctive relief ordered by the district court was within its discretion under the circumstances of this case.

3. Whether the issues addressed in the petition for writ of *certiorari* are properly before this Court where they were not raised or considered below.

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STATEMENT OF THE CASE

1. Statement of the Facts

David Papa was hired by Domino's Pizza, Inc. (Domino's) in June, 1986 as a Manager in Training. In March, 1987, Beth Carrier became Corporate Area Supervisor for Mr. Papa's area. Ms. Carrier promoted Mr. Papa to the position of Manager in June, 1987. While Mr. Papa was employed as Manager of the Port Richey, Florida store, Richard Contois was employed there as Manager in Training, and Donald Whetzel was employed there as a driver. Ms. Carrier was Mr. Papa's immediate supervisor while he managed the Port Richey store.

In early January, 1988, Mr. Papa's marriage was failing and he had sole custody of his little son. Between January and June, 1988, Mr. Papa was subjected to a sexually hostile working environment by Beth Carrier. On a number of occasions, Ms. Carrier told Mr. Papa he had a "nice ass" and placed her hand on his shoulder. Ms. Carrier also touched his buttocks and squeezed them. He repeatedly asked her not to do these things.

On one occasion, Ms. Carrier was helping to make pizza in Mr. Papa's store, slapping the dough with her hands. Then she informed Mr. Papa that her bra had slipped off, requested that he look, and asked him if it turned him on. Mr. Papa objected, telling her to stop it. Mr. Contois was a witness to this.

Ms. Carrier also asked him if he had gotten over his relationship with his ex-wife, if he was dating yet, if he would consider getting married again or having a relationship. Mr. Papa responded that he did not want to talk

about his personal business, that he had just gone through a divorce and a custody battle, and was only interested in a professional working relationship. At that point, Ms. Carrier began to rub Mr. Papa's shoulders and he told her never to do that again.

Approximately six days before he was terminated, Mr. Papa was meeting with Mr. Whetzel and Mr. Contois in his office when Ms. Carrier entered the room. She again requested that Mr. Papa move in with her and told him she'd be a good mother for his son; Mr. Papa said he did not want to hear this. Next, she suggested that she and Mr. Papa should marry, she could take care of his son, and he could become a Domino's supervisor. Again he stated that he did not want to hear this.

When Ms. Carrier then professed her "love" for Mr. Papa, he got angry and ordered her from his office, informing her he would talk to her supervisor, Mike Haskins, about this. Ms. Carrier became very upset, walked to the door, turned and said "we'll see about that". Six days later, Ms. Carrier and Mr. Haskins fired Mr. Papa.

2. Procedural History

This case began in June, 1988 when Mr. Papa retained the undersigned counsel to represent him as to claims of hostile working environment and *quid pro quo* sexual harassment and retaliatory discharge by his Corporate Area Supervisor during his employment as a Domino's Store Manager. Following unsuccessful attempts to settle the matter for a few months' severance pay, Mr. Papa filed a charge containing these allegations with the Equal

Employment Opportunity Commission (EEOC) in September, 1988. The undersigned has represented Respondent Papa throughout the entire protracted course of this litigation for over nine years now.

After a thorough investigation, the EEOC found reasonable cause to believe Mr. Papa had been the victim of discrimination, and filed suit against Domino's on his behalf. Mr. Papa intervened. Following exhaustive discovery and a four day bench trial, the District Court issued Judgment in favor of Mr. Papa and the EEOC on all Counts, awarding him $237,257.52 in back pay damages, and later $34,641.49 in attorney's fees. Domino's appealed to the Eleventh Circuit Court of Appeals. Briefs on the merits were filed by all parties, and oral argument was heard. The Court of Appeals affirmed the District Court's Judgment without opinion, denied Domino's petition for rehearing and suggestion of rehearing *en banc*, as well as its motion for stay pending petition for writ of *certiorari*.

3. Questions Raised by Domino's

This case combines claims of hostile working environment and *quid pro quo* sexual harassment and retaliatory discharge, and thus is not an appropriate vehicle for further defining standards of liability in pure hostile environment cases, the one area in which some circuit courts of appeal differ. The District Court's award of injunctive relief does not warrant review. Ordering Domino's to post notices of its sexual harassment policies and to train managers in their use was a proper exercise of the court's discretion where a number of Domino's

employees testified that they were unaware of any such policies. Domino's did not raise or argue either of these issues below and should be foreclosed from doing so here, especially where the law in these areas has not changed since it filed its appeal to the circuit court.

ARGUMENT

I A COMBINED HOSTILE WORKING ENVIRONMENT AND QUID PRO QUO SEXUAL HARASSMENT CASE IS NOT THE PROPER VEHICLE FOR THE ANNOUNCEMENT OF NEW OR CLARIFIED STANDARDS OF EMPLOYER LIABILITY FOR PURE HOSTILE ENVIRONMENT HARASSMENT.

Domino's contention to the contrary, this case presents no difficult or important questions as to the law of employer liability for sexual harassment. Only in the area of hostile working environment claims have some courts disagreed on the formulation of appropriate standards for holding employers liable for supervisor and co-worker harassment; federal courts are unanimous in holding employers strictly liable for *quid pro quo* sexual harassment. In a case such as this one, where both hostile working environment and *quid pro quo* sexual harassment by a supervisor, as well as retaliatory discharge, are found, independent grounds exist for the District Court's decision to hold Domino's liable, so that any clarification of hostile working environment liability standards would not change the result here.

All monetary relief ordered by the District Court was in the nature of back pay and benefits, prejudgment

interest, attorney's fees and costs, and all such relief was attendant upon the job detriment Mr. Papa suffered because of his rejection of his supervisor's advances, his retaliatory discharge. No compensatory or punitive damages are at issue here; they were not awardable as this case arose before the effective date of the Civil Rights Act of 1991. So there were no damages awarded which were directly attributable to Mr. Papa's hostile working environment claim. Hence, even if the hostile working environment claim were not upheld, the relief to Mr. Papa would remain the same. *Certiorari* should not be granted under such circumstances.

A. Hostile Working Environment Sexual Harassment

Domino's challenges primarily the District Court's finding of liability for hostile environment harassment, and most of its Petition for *Certiorari* focusses on decisions in different circuit courts of appeals discussing employer liability for hostile working environment sexual harassment, an issue on which there is some disagreement. Even in hostile working environment jurisprudence, however, more areas of general agreement exist than Domino's suggests.

These cases are often decided with reference to agency principles found in the RESTATEMENT (SECOND) OF AGENCY § 219 (1958) (the RESTATEMENT), as directed in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 63 (1986), which establishes five theories under which employers may be held liable for actions of their employees:

> (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
>
> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
>
> (a) the master intended the conduct or the consequences, or
>
> (b) the master was negligent or reckless, or
>
> (c) the conduct violated a non-delegable duty of the master, or
>
> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

The RESTATEMENT has provided a flexible framework which has served federal courts deciding sexual harassment cases reasonably well for over a decade, and which Domino's would have this Court abandon.

A survey of relatively recent cases discussing employer liability for hostile working environment sexual harassment shows that they fall into two general categories: those that rely upon the use of actual or apparent authority or the existence of the agency relationship, and those that require actual or constructive notice to the employer of the hostile working environment allegations.

1. Use of Authority or the Agency Relationship

In *Karibian v. Columbia University*, 14 F.3d 773 (2d Cir. 1994), the Second Circuit held that "an employer is liable for the discriminatorily abusive work environment created by a supervisor if the supervisor uses his actual or apparent authority to further the harassment, or if he was otherwise aided in accomplishing the harassment by the existence of the agency relationship." *Id.* at 780. In so holding, the appeals court found the employer liable regardless of the absence of notice or the reasonableness of the employer's complaint procedures because the supervisor had capitalized upon his authority over the plaintiff's employment to force her to endure a demeaning sexual relationship.

Citing *Karibian*, the Second Circuit in *Torres v. Pisano*, 116 F.3d 625 (2d Cir. 1997), distinguished between supervisors alleged to have created a sexually hostile working environment who have the "authority to control significant aspects of the work environment" (1997 U.S. App. LEXIS 12805 at 26) and supervisors and co-workers lacking such authority. The plaintiff must allege facts which show a nexus between the supervisory authority and the harassment. *Id.* at 25. A four part rule was then announced. An employer will be held liable for supervisor harassment if:

a) the supervisor was at a sufficiently high level in the company, or

> b) the supervisor used his actual or apparent authority to further the harassment, or was otherwise aided in accomplishing the harassment by the existence of the agency relationship, or
>
> c) the employer provided no reasonable avenue for complaint, or
>
> d) the employer knew (or should have known) of the harassment but unreasonably failed to stop it.

Id. at 20-21.

The Sixth Circuit's standard of liability for hostile environment claims of sexual harassment caused by the acts of a supervisor was first addressed in *Yates v. Avco Corp.*, 819 F.2d 630 (6th Cir. 1987) and later reiterated in *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178 (6th Cir. 1992), both of which applied modified agency principles. According to *Yates*:

> The essential question in applying agency principles is whether the act complained of took place in the scope of the agent's employment. This determination requires an examination of such factors as when the act took place, where it took place, and whether it was foreseeable.

Yates, 819 F.2d at 636.

Kauffman explained that this "scope of employment" standard for supervisors is distinguishable from the "knew or should have known" *respondeat superior* standard for co-worker harassment cases. In a case of hostile working environment harassment by a supervisor, the *Kauffman* court agreed with the Fourth Circuit in *Paroline v. Unisys Corp.*, 879 F.2d 100, 104 (4th Cir. 1989), vacated on other grounds, 900 F.2d 27 (4th Cir. 1990) that "an

individual qualifies as an employer under Title VII if he or she serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing or conditions of employment." Under the standards set forth in *Yates* and *Kauffman*, the agency liability is not strict and can be negated if the employer takes adequate and effective remedial action once it has notice of the harassment. *Kauffman*, 970 F.2d at 184.

The Sixth Circuit took *Kauffman* a step further in *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343 (6th Cir. 1995), in deciding that an employer is liable for a supervisor's creation of a sexually hostile work environment "even if those acts are not committed within the actual scope of his employment, if the employee uses his apparent authority to accomplish the wrongful acts and so is acting within the 'apparent scope' of his employment." *Id.* at 1352. Whether his supervisors knew or should have known what he did is irrelevant.

The Tenth Circuit also relies on agency law to hold employers responsible for hostile environment sexual harassment of their supervisors. In *Hicks v. The Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987), the court held that § 219(2) "creates employer liability when (1) the master was negligent or reckless, . . . and (2) where the servant purported to act or to speak on behalf of the principal and there was reliance on apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation." *Id.* at 1418. In accord was *Sauers v. Salt Lake County*, 1 F.3d 1122 (10th Cir. 1993). Where a supervisor has significant control over plaintiff's hiring, firing or conditions of employment, he has such authority over her employment as to render the employer liable for

his hostile work environment harassment, and no knowledge or recklessness on the part of the employer need be demonstrated. *Id.* at 1125.

The RESTATEMENT was also cited in *Harrison v. Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997), which would hold the employer liable for a sexually hostile environment created by a supervisor "if the employer delegated the authority to the supervisor to control the plaintiff's work environment and the supervisor abused that delegated authority by using that authority to aid or facilitate his perpetration of the harassment." *Id.* at 1446.

As will be discussed *infra*, the Eleventh Circuit Court of Appeals, the jurisdiction from which this case arose, also decides hostile environment liability questions based on agency principles. Its well-settled jurisprudence was the source for the District Court's conclusions of law herein.

2. "Knew or Should Have Known": the Negligence Standard

A minority of the circuits have decided cases involving employer liability for hostile working environment sexual harassment under a negligence standard. In *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988), a Title IX case, the court ruled an educational institution is liable for hostile environment harassment of an employee by its supervisor if an "official representing the institution knew, or in the exercise of reasonable care, should have known, of the harassment's occurrence, unless that official can show that he or she took appropriate steps to halt it." *Id.* at 901.

In the Fourth Circuit, agency principles were combined with the negligence standard in the case of *Paroline, supra*. The same is true in the Fifth Circuit, as evidenced by *Canutillo Independent School District v. Leija*, 101 F.3d 393 (5th Cir. 1996), which cited *Paroline*.

The Seventh Circuit presented a more confused picture in the combined cases of *Jansen v. Packaging Corp. of America* and *Ellerth v. Burlington Industries, Inc.*, ___ F.3d ___, 1997 U.S. App. LEXIS 22266 (7th Cir. Aug. 12, 1997) (en banc). The entire court agreed only on the negligence standard for employer liability in hostile environment cases and strict liability for *quid pro quo* sexual harassment.

The Eighth Circuit applies the "knew or should have known" standard in supervisor-induced hostile environment cases, and the court in *Davis v. City of Sioux City*, 115 F.3d 1365 (8th Cir. 1997) declined to deviate from binding precedent to set a different rule. The *Davis* court explained, however, that the "knowledge requirement may be dropped where 'someone at the decision-making level in the corporate hierarchy has committed the wrong' ". *Id.* at 1368.

The other circuit deciding employer liability for hostile environment claims under the negligence rubric is the Ninth. In *Nichols v. Frank*, 42 F.3d 503 (9th Cir. 1994), the court held that "employers are liable for failing to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known." *Id.* at 508, relying on *EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989).

3. Effective Sexual Harassment or Grievance Policy

Two circuits have decided to absolve employers of liability for hostile working environment sexual harassment where they had promulgated policies enabling employees to complain of hostile working environment sexual harassment to upper management.

In *Gary v. Long*, 59 F.3d 1391 (D.C. Cir. 1995), the court concluded that an employer will not be held liable "if the employer is able to establish that it had adopted policies and implemented measures such that the victimized employee knew or should have known that the employer did not tolerate such conduct and she could report it to the employer without fear of adverse consequences." *Id.* at 1398.

The court in *Bouton v. BMW of North America, Inc.*, 29 F.3d 103 (3d Cir. 1994) held that "an effective grievance procedure – one that is known to the victim and that timely stops the harassment – shields the employer from Title VII liability for a hostile environment." *Id.* at 110.

Neither court mentions the rejection of that theory in *Meritor*, in which this Court made clear that "the mere existence of a grievance procedure and a policy against discrimination, coupled with [the plaintiff's] failure to invoke that procedure" does not insulate the employer from liability for a sexually hostile working environment. *Meritor*, 477 U.S. at 72.

B. Quid Pro Quo Sexual Harassment

All circuit courts of appeals uniformly agree with this Court in *Meritor* that employers are strictly liable for *quid pro quo* sexual harassment. *Meritor*, 477 U.S. at 70-71.

C. Sexual Harassment Liability in the Eleventh Circuit

The seminal sexual harassment case was *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982). In *Henson*, the Eleventh Circuit applied the "knew or should have known" negligence standard for hostile working environment sexual harassment by a co-worker or supervisor, but stated that if the supervisor was the plaintiff's employer, the City would be liable for his actions. The *Henson* court considered the *quid pro quo* claim separately, holding that, where an employee's rejection of the supervisor's harassment causes her to suffer a tangible job detriment, the employer is held liable for the supervisor's harassment. The court noted that many cases could be characterized interchangeably as hostile environment or *quid pro quo* cases.

After *Meritor* was decided, the Eleventh Circuit further clarified employer liability standards in the case of *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554 (11th Cir. 1987), holding that, while notice to the employer may be necessary where the supervisor was not acting as an agent in that he had no authority over the employee he was harassing, where the harasser was plaintiff's employer or its agent, *respondeat superior* did not apply and no notice was necessary. The *Sparks* court noted that

"to the extent that the Henson court's discussion of hostile work environment sexual harassment can be read as holding that notice to the defendant employer is required even where the supervisor was the defendant's agent, and thus the victim's 'employer', it was overruled by the Supreme Court in *Vinson*. *Vinson*, 106 S.Ct. at 2408." *Sparks*, 830 F.2d at 1559, n.7.

Most important, *Sparks* made clear that where both *quid pro quo* and hostile environment by the employer's agent are shown, the employer is held strictly liable. Where the supervisor threatened to use the authority delegated to him to the plaintiff's detriment, the court need not address "what rule should govern the employer's liability for sexual harassment by its supervisors where the sexual harassment claim rests 'exclusively' on a 'hostile environment' theory. *Id.* at 1560.

Such a pure hostile environment case was *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311 (11th Cir. 1989). In *Steele*, the court explained that the

> standard for determining corporate liability due to a supervisor's sexual harassment depends on the type of sexual harassment that occurs. In a quid pro quo case, the corporate defendant is strictly liable for the supervisor's harassment- . . . This is logical. When a supervisor requires sexual favors as quid pro quo for job benefits, the supervisor, by definition, acts as the company. In such a case, the supervisor relies upon his apparent or actual authority to extort sexual consideration from an employee. Therein lies the quid pro quo. In that case the supervisor uses the means furnished to him by the employer to accomplish the prohibited purpose.

> He acts within the scope of his actual or apparent authority to hire, fire, discipline or promote . . . Strict liability is illogical in a pure hostile environment setting. In a hostile environment case, no quid pro quo exists. The supervisor does not act as the company; the supervisor acts outside "the scope of actual or apparent authority to hire, fire, discipline, or promote." Corporate liability, therefore, exists only through respondeat superior; liability exists where the corporate defendant knew or should have known of the harassment and failed to take prompt remedial action against the supervisor.

Id. at 1316.

This statement of the law of employer liability is still followed today in most circuits. It was not changed in any essential feature by the recent case of *Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir. 1997) (*en banc*), which itself does not conflict with standards applied in other circuits, contrary to Domino's contention in its Petition for *Certiorari*. *Faragher* cites *Sparks* and *Steele* repeatedly with approval and once again explains the distinction between a pure hostile environment case (the *Steele* paradigm) and one which combines both *quid pro quo* and hostile working environment (the *Sparks* paradigm). *Id.* at 1537. Accord, *Robinson v. City of Pittsburgh*, 120 F.3d 1286 (3d Cir. 1997); *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777 (1st Cir. 1990).

The case at bar combines *quid pro quo* and hostile working environment sexual harassment claims, as well as retaliatory discharge, and so was properly decided under the *Sparks* agency rationale. Accordingly, it is not

an appropriate vehicle for a pronouncement of new or clarified standards, which in any event are not needed, where most circuits, including the Eleventh, agree on the broad principles of employer sexual harassment liability.

D. Rebuttal to Domino's Statement Regarding This Case

In its Section I C., Domino's makes several misleading statements with regard to the instant case. After stating that the District Court had found that Mr. Papa's supervisor, Ms. Carrier, had inappropriately touched him, made a number of sexually-related comments to him and expressed her "love" for him, Domino's claims that "these were all modes of harassment easily available to a non-supervisory employee". (Petition, p. 19). Whether a non-supervisory employee could have taken these actions is irrelevant here; the fact is that Mr. Papa's supervisor perpetrated this harassment and was aided in doing so by the existence of the agency relation.

Domino's contends that "the trial court did not find that Carrier made any sexual demands, let alone that the conduct in question was accompanied by statements or suggestions that, if Papa did not submit to her overtures, a job detriment would occur." (Petition, p. 19). But the District Court found that "Papa's reaction to Carrier's unwelcome *sexual advances* affected tangible aspects of his compensation, terms, conditions or privileges of employment" when, after she "invited him to live with her", he rejected her advances and warned he would notify her supervisor, she "threatened to get even". *EEOC and Papa v. Domino's Pizza, Inc.*, 909 F. Supp. 1529, 1536 (M.D. Fla.

1995). (*Emphasis supplied*). Domino's may see some distinction between "demands" and "advances", but none exists in the case law.

Domino's asserts that Ms. Carrier did not "accomplish" the harassment in question by using her role as supervisor (Petition, p. 20), but in what other role could she have continually entered his store, touched his neck, back and buttocks, told him he had a "nice ass" which "turns me on", and urged him to move in with her? Mr. Papa would not have felt coerced to tolerate such treatment by a customer or subordinate; he would have sent them packing. Only when he most vehemently rejected Ms. Carrier's advances, did she turn and threaten to "get him", a threat on which she acted six days later when she fired him.

The statement on page 20 of Domino's Petition that "there was no finding that Carrier made any threats, conditions or demands to elicit sexual favors from Papa in the present case", simply defies the facts. When Mr. Papa rejected her "love" and exhortation to move in with her, she warned she would "get him". *Id.* at 1533. Both the District Court and the Eleventh Circuit interpreted this as a threat, and one on which she made good.

Defendant's attempt to cast doubt on the District Court's finding of *quid pro quo* sexual harassment is similarly unavailing where the job detriment, termination from employment, was so clearly linked to Mr. Papa's final rejection of his supervisor's advances. The facts in *Farley v. American Cast Iron Pipe Co.*, 115 F.3d 1548 (11th Cir. 1997) are entirely unlike the circumstances of the case under consideration. In *Farley*, the harasser was not the

plaintiff's supervisor during the harassment period, and had no actual or apparent authority to affect the terms of the plaintiff's employment. *Id.* at 1553. In this case, Ms. Carrier was Mr. Papa's supervisor, with the authority to fire him, which she did.

Domino's insistence on misstating the District Court's findings of fact and conclusions of law is especially irksome for its repeated assertion that the "trier of fact makes no finding that the supervisor made explicit sexual requests or demands". (Petition, p. 21). The District Court referred to Ms. Carrier's conduct as "unwelcome sexual advances", and described her sexually-oriented verbal and physical conduct in detail. Sexual harassment is defined as "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature". *Henson*, 682 F.2d at 903. Hence, the District Court made findings sufficient to render Domino's liable for both hostile environment and *quid pro quo* sexual harassment.

Domino's is confused as to the distinction between a *quid pro quo* sexual harassment claim and a retaliatory discharge claim, but the difference is self-evident. In a *quid pro quo* claim, the plaintiff suffers a job detriment (perhaps a demotion, a pay cut, or termination) because of his rejection of his supervisor's sexual advances. In a retaliatory discharge, the plaintiff is dismissed because he has complained, reported or testified, or threatened to complain, report or testify concerning conduct made unlawful by § 704(a), the "opposition clause" of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"). The District Court found that, when Mr. Papa "voiced his opposition to Carrier's sexual advances

at the meeting approximately six days prior to his discharge, he was engaging in protected activity under section 704(a) of Title VII." *EEOC and Papa v. Domino's Pizza, Inc.*, 909 F. Supp. at 1536.

In its footnote 7 on page 21 of the Petition for *Certiorari*, Domino's gives the erroneous impression that the District Court found only that the motivation for Ms. Carrier's report that Mr. Papa had engaged in "manipulation of paperwork", which led to his termination, was "improper". The District Court found that Ms. Carrier's report was made "in retaliation for Papa's rejection of her sexual advances". *Id.* at 1537. As such, the District Court found Domino's asserted reason for Mr. Papa's termination to be pretextual. Mr. Haskins had no role in Mr. Papa's termination other than accompanying Ms. Carrier to accomplish this task. The District Court found that his (and Domino's) only notice of this alleged "manipulation" came from Ms. Carrier. *Id.* at 1534.

In sum, Domino's has failed to show that the District Court's decision was erroneous in any respect, whether on the facts or the law, as to the hostile working environment and *quid pro quo* sexual harassment claims or the retaliatory discharge claim. Consequently, this case does not provide a springboard for this Court to elucidate the already clear distinctions between these kinds of claims.

II THE NATURE AND SCOPE OF THE INJUNCTIVE RELIEF ORDERED BY THE DISTRICT COURT WAS WITHIN ITS DISCRETION UNDER THE CIRCUMSTANCES OF THIS CASE.

Domino's complains that, because the trial court found one employee had been sexually harassed a number of years ago by one supervisor at one of its many locations, the injunctive relief ordered by the District Court was overbroad, but this contention is unsupported by the law. The time gap between the unlawful conduct and the present is largely the result of Domino's own delays and intransigence, and is, in any event, irrelevant.

This Court has held that "the grant or denial of an injunction is committed to the sound discretion of the district court . . . Although the court found that discrimination no longer exists, the power to issue an injunction survives discontinuance of the illegal conduct sought to be enjoined." *N.A.A.C.P. v. City of Evergreen*, 693 F.2d 1367, 1370 (11th Cir. 1982), citing *United States v. W.T. Grant*, 345 U.S. 629, 633 (1953).

In this case, the EEOC was the plaintiff, and Mr. Papa the intervenor. The EEOC may pursue broader equitable remedies than an individual claimant. *EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286 (7th Cir. 1993). *EEOC v. Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244, 1253 (11th Cir. 1997). In *Massey Yardley*, an individual age discrimination case, the EEOC asked for an order enjoining the employer from further age discrimination and requiring company management to undergo EEOC training and posting of notices. The trial court denied injunctive relief

and the Eleventh Circuit reversed, remanding to the district court to grant the requested relief.

Even though the plaintiff had decided not to seek reinstatement, the *Massey Yardley* court noted there would be "little point in [EEOC's] having the independent power to sue if it could not obtain relief beyond that fashioned for the individual claimant." *Id.* at 1253. The court reasoned that

> the EEOC is normally entitled to injunctive relief where it proves discrimination against one employee and the employer fails to prove that the violation is not likely to recur. The EEOC represents the public interest when litigating claims, and, through injunctive relief, seeks to protect not only the rights of the individual claimant, but those of similarly-situated employees by deterring the employer from future discrimination . . . "In this respect, the EEOC acts to vindicate the public interest in preventing employment discrimination."

Id. at 1253, citing *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1544 (9th Cir. 1987), and quoting *General Telephone Co. v. EEOC*, 446 U.S. 318, 326 (1980).

In *Massey Yardley*, where there was no evidence that the employer's anti-harassment policy was disseminated, the employer had failed to prove that the violation was unlikely to recur. Similarly, here the District Court ordered Domino's to post notices of its anti-harassment and retaliation policies based on testimony from four employees that they had not ever seen the policies and from three employees that they had not been trained in them. I Tr. 54-55; II Tr. 169; Stout Dep. 78; Cerniglia Dep.

104, 115; Contois Dep. 67-69. In enjoining the company from engaging in any employment practice which discriminates against employees by subjecting them to sexual harassment or retaliation for opposing discriminatory employment practices, the District Court merely ordered Domino's to obey the law.

> Under Title VII, courts have been granted broad equitable powers to remedy statutory violations by fashioning the most complete relief possible . . . The district courts have "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future" . . . The particular remedy granted is left largely to the broad discretion of the district court.

Kilgo v. Bowman Transportation, Inc., 789 F.2d 859, 879-80 (11th Cir. 1986). [Citations omitted].

Under the circumstances of this case, the District Court was well within its discretion in ordering the type of injunctive relief described in its decision.

III BECAUSE THE ISSUES ADDRESSED IN THE PETITION FOR CERTIORARI WERE NOT RAISED OR CONSIDERED BELOW, THEY ARE NOT PROPERLY BEFORE THIS COURT.

Issues concerning the standard for imposing liability on employers for sexual harassment and concerning the nature and scope of permissible injunctive relief under the circumstances of this case were not raised or argued below, nor were they considered by the Court of Appeals. Moreover, on appeal, Domino's expressly acknowledged

that the District Court had applied the proper legal standards.

On page 20 of its Initial Brief to the Eleventh Circuit, Domino's argued that the District Court "failed to review all of the evidence before it when *applying the required legal standards.*" [*Emphasis supplied*]. On page 22 of its Initial Brief, Domino's conceded that the "District Court *utilized the appropriate analysis*" as to the hostile working environment claim. [*Emphasis supplied*]. Instead, Domino's took issue with the District Court's interpretation of the facts and the evidence, contending, as to the hostile working environment claim, that Ms. Carrier's conduct was not sufficiently frequent, pervasive or severe and did not alter the conditions of Mr. Papa's employment. (Initial Brief, p. 31).

As to the *quid pro quo* claim, Domino's argued that the District court was clearly erroneous in determining that the EEOC and Mr. Papa had established a *prima facie* case. As to the retaliation claim, Domino's argued clear error as well, taking issue with the District Court's finding that the company's asserted reason for Mr. Papa's termination was pretextual. As to the relief awarded, Domino's quarreled with the District Court's award of back pay, not injunctive relief. (Initial Brief, pp. 46-49).

Having admitted that the District Court was correct in its legal analysis, and having made entirely different arguments below, Domino's cannot here raise for the first time inconsistent and novel grounds for reversal of the District Court's ruling. This Court has been very clear that "only in exceptional cases will this Court review a

question not raised in the court below." *Lawn v. United States*, 355 U.S. 339, 362-363 n.16 (1958).

Where issues were neither raised nor considered by the court of appeals, this Court will not ordinarily consider them. *Adickes v. Kress*, 398 U.S. 144, 147-148 n.2 (1970). The Court will decline to reach an argument not made in or addressed by the court of appeals. *Monsanto v. Spray-Rite Service Corp.*, 465 U.S. 752, 759-761 n.6 (1984). *Brandon v. Holt*, 469 U.S. 464, 473 n.25 (1985).

The reluctance of this Court to consider issues not raised below is not absolute, but is a prudential rule. *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992) (declining to hear claims not raised below). Where a party raises "not a new claim . . . but a new argument to support what has been his consistent claim . . . , we would ordinarily feel free to address it, since it was addressed by the court below." *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Supreme Court practice permits review of an issue not previously argued so long as it has been "passed upon" by the court of appeals. *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991).

The issues which comprise the subject matter of Domino's Petition for *Certiorari* were neither addressed nor passed upon by the court below. Where Domino's made entirely different arguments in the Eleventh Circuit, it should not be permitted to raise new and contradictory arguments in this Court.

Finally, Domino's suggests that this Court should enter a "GVR" order, remanding this case to the Eleventh Circuit for reconsideration in light of *Faragher v. City of Boca Raton, supra*, but Domino's has shown no grounds

for this Court to enter such an order. As discussed previously, the instant case does not conflict with *Faragher.* The *Faragher* case was a pure hostile working environment case which the *Faragher* court distinguished from cases in which plaintiffs had alleged both hostile working environment and *quid pro quo* sexual harassment, such as this case.

Domino's cites two decisions of this Court as authorizing it to enter a "GVR" order, but fails to state how they apply to the case at bar.

In *Lords Landings Village Condominium Council of Unit Owners v. Continental Insurance Co.*, 117 S.Ct. 1731 (1997), this Court explained when it is proper to issue a "GVR" order, citing *Lawrence v. Chater*, 116 S. Ct. 611 (1996).

> Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is . . . potentially appropriate.

Here, there is no reason to believe that the Eleventh Circuit did not fully consider any recent or intervening developments, including the *Faragher* opinion, and no probability that the decision on appeal rests on a premise the Eleventh Circuit would reject if given the opportunity for further consideration. That court *was* given the opportunity for further consideration when Domino's petitioned for rehearing *en banc*, and did not choose to

reconsider its summary affirmance of the District Court's decision in light of *Faragher.*

The second case cited by Domino's in support of its contention that the Supreme Court should issue a "GVR" order here also does not avail as it too is factually distinguishable from the instant case. In *Stutson v. United States,* 116 S.Ct. 600 (1996), a criminal case, the prevailing party below was the federal government, which had repudiated the legal position it advanced below, and the only opinion below did not consider the import of a recent Supreme Court precedent which both parties now agreed applied. This was truly a case where a "GVR" order was appropriate, but its circumstances differ greatly from those in the above-captioned case.

Here, the prevailing parties, one of which is the federal government, have not changed their positions, and there is no controlling precedent which the Eleventh Circuit did not consider in affirming the District Court.

Lawrence v. Chater, supra, lists a number of instances in which the Supreme Court will issue a "GVR" order: intervening Supreme Court decisions, state supreme court decisions, new federal statutes, administrative reinterpretations of federal statutes, new state statutes, changed factual circumstances, confessions of error or other positions newly taken by the Solicitor General and state attorneys general. But none are applicable here. Therefore, a "GVR" order would not be proper in this case.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of *Certiorari* filed by Domino's Pizza, Inc. should be denied, and attorney's fees and costs awarded to Mr. Papa for his response in opposition.

Respectfully submitted,

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